IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1618

SIMON L. LEIS, JR., HONORABLE WILLIAM J. MORRISSEY, HONORABLE ROBERT S. KRAFT, AND THE HAMILTON COUNTY COURT OF COMMON PLEAS,

Petitioners,

vs.

LARRY FLYNT, HUSTLER MAGAZINE, INC., HERALD PRICE FAHRINGER, AND PAUL J. CAMBRIA, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED J. CARTOLANO
First Assistant Prosecuting Attorney
420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Counsel for Petitioners

WILLIAM E. BREYER
Assistant Prosecuting Attorney
420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Of Counsel

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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CITATIONS

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The Petitioners, Simon L. Leis, Jr., et al., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 12, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 12, 1978, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1), and other appropriate jurisdictional statutes.

QUESTIONS PRESENTED

1. Whether a federal court may enjoin an ongoing state criminal prosecution for reasons which do not concern that prosecution and which do not involve the rights of the defendant in that State prosecution.
2. Whether a federal court can force an Ohio criminal trial court to allow a non resident attorney, not admitted to practice in Ohio, to appear pro hac vice without the consent of the state court judge presiding at that trial.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code 4705.01, *Practice of Law:*

> "No person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of another person, unless he has been admitted to the bar by order of the Supreme Court in compliance with its prescribed and published rules."

Ohio Supreme Court Rules for the Government of the Bar Rule I, Section 8(C):

> **"Admission Without Examination**
>
> (C) An applicant under this section shall not engage in the practice of law in the state prior to the filing of his application. To do so constitutes the unauthorized practice of law and will result in the denial of the application. This paragraph (C) does not apply to participation by a non-resident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such case."

STATEMENT OF THE CASE[1]

This case involves an attempt by federal courts to force the Ohio Criminal Courts to allow out of state counsel, unlicensed in Ohio, to represent criminal defendants in the Ohio Courts. It also involves the federal courts enjoining an ongoing state criminal prosecution for reasons not concerning the defendants in the ongoing state prosecution. More specifically, an ongoing state criminal prosecution has been enjoined to protect the alleged pecuniary interest of out of state attorneys, as well as to protect the professional reputation of those same attorneys. The facts and procedural posture of this matter are stated below.

I. OHIO CRIMINAL PROCEEDINGS

On February 8, 1977, the Hamilton County, Ohio, Grand Jury returned an indictment charging Larry Flynt and Hustler Magazine, Inc., with multiple counts of Disseminating Material Harmful to Juveniles, contrary to Ohio Revised Code, Section 2907.31. Defendant Larry Flynt was a resident of Columbus, Ohio. Defendant Hustler Magazine, Inc., was an Ohio corporation doing business in Ohio.

On February 25, 1977, arraignment was held in this matter before Judge Rupert Doan of the Hamilton County Court of Common Pleas. Judge Doan was the judge designated to handle all arraignments that particular month. Andrew Den-

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[1] All page references are to the appendix contained in the certified record from the Court of Appeals for the Sixth Circuit.

nison, an attorney of the Ohio Bar, presented an entry of counsel bearing the names of Herald Fahringer and Paul Cambria as counsel for Flynt and Hustler Magazine. The entry submitted was a form entry used by counsel already admitted to practice in Ohio. It had no bearing or relevancy to admission pro hac vice of foreign counsel.[2] *Neither of these men were licensed to practice law in Ohio, nor did either of these men apply for admission pro hac vice.* Fahringer and Cambria did not appear and their names were signed to the entry by Andrew Dennison. This entry was routinely endorsed by the judge handling the arraignment.

This case was assigned to Judge William Morrissey for trial. This assignment was done as a matter of course because defendant Flynt already had another active indictment pending before Judge Morrissey. In Hamilton County, Ohio, a

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[2] **Rule 10-F, Rules of Hamilton County Court of Common Pleas**

Any attorney who accepts private employment in any criminal case shall be required to sign the following entry which shall be filed with the papers in the case:

COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO, CRIMINAL DIVISION

No. .....
Entry

STATE OF OHIO
Plaintiff,
vs.
.....

The undersigned has been retained as counsel for the above named defendant —— and moves the Court that such fact be entered of record.

.....
Attorney for Defendant.

It is so ordered,

.....
Judge

Thereupon such attorney shall become Attorney of Record upon the Journal of this Court and shall not be permitted to withdraw except upon written motion and for good cause shown.

criminal indictment is automatically assigned for trial to the same judge who has been assigned by lot to any active indictment involving the same defendant. Thus the defendants knew, even before they were arraigned, that their case would be presided over by Judge Morrissey. Despite this, the out of state counsel, Fahringer and Cambria, never applied to Judge Morrissey (or any other judge for that matter) for admission pro hac vice.

On March 9, 1977, a pre-trial conference was held by Judge Morrissey. Present were Andrew Dennison and representatives of the prosecutor's office. Out of state counsel Fahringer and Cambria were not present. Judge Morrissey announced a trial date of May 2, 1977, and set April 8, 1977, as the date when all motions would be argued. At that time Judge Morrissey advised Mr. Dennison, pursuant to Rule I, Section (8) (C) of the Ohio Rules for the Government of the Bar, that out of state counsel would not be permitted to act as trial counsel (Appendix, p. 97). At this time no pre-trial motions had been filed by any defense counsel. However, on March 31, 1977, unadmitted, out of state counsel, Fahringer and Cambria, along with local attorney Dennison filed various motions attacking the indictment.

On April 8, 1977, Larry Flynt and Hustler Magazine, Inc., appeared before Judge Morrissey and for the first time objected to the ruling forbidding active participation of out of state counsel Fahringer and Cambria. Also present at this hearing were Fahringer, Cambria and Dennison.

On April 15, 1977, Flynt, Hustler, Fahringer and Cambria filed an action in Mandamus with the Ohio Supreme Court, requesting an order setting aside the ruling of Judge Morrissey. This action was dismissed by the Supreme Court of Ohio on April 29, 1977.

On April 27, 1977, Flynt and Hustler Magazine, Inc. filed an Affidavit of Bias and Prejudice with the Ohio Supreme Court seeking the removal of Judge Morrissey. On May 2, 1977, that Court, while stating it found no evidence of bias or prejudice, removed Judge Morrissey from the case in or-

der to avoid even the appearance of any impropriety. The case was subsequently reassigned to Judge Robert Kraft, of the Hamilton County Court of Common Pleas, for the purposes of trial.

On May 10, 1977 Judge Kraft, after hearing argument, refused to permit out of state counsel, Fahringer and Cambria, to act as trial counsel in the criminal trial of Flynt and Hustler. (See appendix p. 98). Judge Kraft did indicate, however, that Fahringer and Cambria could work with Ohio trial counsel on the case (See appendix p. 56).

II. PROCEEDINGS IN FEDERAL COURT

On June 14, 1977, Flynt, Hustler, Fahringer and Cambria, listing each of themselves as plaintiffs, filed suit in federal district court seeking to enjoin the further prosecution of the state charges, and seeking declaratory relief that the statute under which the state charges were filed was unconstitutional. On July 18, 1977, District Judge Rubin issued his order enjoining the state criminal trial, until out of state counsel Fahringer and Cambria were granted a hearing as to their property right in the representation of Flynt and Hustler Magazine, Inc. (appendix p. 134) Flynt and Hustler were granted no relief at all since all of their claims could be fully litigated in the state courts.

III. RULING BY DISTRICT JUDGE RUBIN

On July 8, 1977, Judge Rubin, finding jurisdiction in 42 U.S.C. 1983 and 28 U.S.C. 1343 (3), issued an order enjoining further prosecution in the Ohio courts of the Ohio criminal charges, until such time as the out of state attorneys, Fahringer and Cambria, were granted an appropriate hearing on their 'right' to represent the defendants Flynt and Hustler. The granting of the injunction was based on the court's finding of extraordinary circumstances in the termination of out of state counsels, Fahringer and Cambria, relationship with Flynt

and Hustler Magazine, Inc. The district court further found that the right of out of state counsel to represent Flynt and Hustler in the Ohio courts was a property right. (appendix p. 131)

IV. RULING BY SIXTH CIRCUIT COURT OF APPEALS

On April 12, 1978, the Sixth Circuit Court of Appeals released its decision affirming the action taken by the District Court. The Court of Appeals dealt with the two issues in this case as follows:

1. Admission of Out of State Counsel:

> "Their interest had developed to a point where the court's action in removing them not only deprived them of their expectation of service and renumeration but also adversely reflected upon their competence and integrity . . . . they could not be denied the right to appear without a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion."

2. Federal Abstention from State Proceedings:

> "In the instant case the out-of-state lawyers do not have an adequate state remedy for the due process violation, and we therefore affirm the decision of the court below enjoining temporarily the state court proceedings pending a due process hearing." (see appendix pages 2a and 13a, infra)

Petitioners have filed this writ seeking review by this court of the decision of the Sixth Circuit Court of Appeals. That decision is in conflict with decisions of this Court and other Courts of Appeals in the area of pro hac vice admission of out of state counsel, and raises a federal abstention issue which has never been directly decided by this court.

REASONS FOR GRANTING THE WRIT

1. The decision of the lower court forcing the Ohio Trial Court to allow out-of-state attorneys, who are not licensed in Ohio, to practice in the Ohio Courts, is in conflict with decisions of the United States Supreme Court and with decisions of other lower federal courts.

The essence of the ruling by the Sixth Circuit Court of Appeals is that the Ohio trial courts must allow out of state attorneys, who are unlicensed to practice in Ohio, to practice in the Ohio courts unless it can be affirmatively demonstrated that these attorneys are unfit to practice. This ruling flies in the face of long established case law that the states have the undisputed right to set requirements for admission to their respective bars and to regulate the practice of law within their borders. *Goldfarb* v. *Virginia,* 421 U.S. 773 (1975); *Konigsberg* v. *State Bar of California,* 366 U.S. 36 (1961); *In re: Isserman,* 345 U.S. 286 (1953); *In re: Lockwood,* 154 U.S. 116 (1894); *Bradwell* v. *Illinois,* 83 U.S. (16 Wall) 130 (1872). Pursuant to the above cited principle of law Ohio has provided by statute that no person may practice law in Ohio without being admitted to the Ohio bar pursuant to rules established by the Ohio Supreme Court. O.R.C. 4705.01 *Practice of Law* (cited, supra). Ohio has specifically provided for this admission, pro hac vice, of out of state counsel in Rule I Section 8 (C) of the Rules for the Government of the Bar (cited supra). This rule provides that out of state counsel may be admitted pro hac vice only by permission of the judge presiding over the hearing. Despite the well settled case law allowing Ohio to establish such a rule the Sixth Circuit Court of Appeals has ruled in this case that out of state counsel may not be excluded unless it can be shown, by granting them a hearing and taking testimony, that they are not qualified to practice. This decision is in direct conflict with the decision of the United States Supreme Court

in *Norfolk and Western Railway Company* v. *Beatty,* 423 U.S. 1009 (1976), which decision summarily affirmed the lower court decision in *Norfolk and Western Railway Company* v. *Beatty,* 400 F.S. 234 (1975). The decision of the lower court in the instant case is also in direct conflict with the following lower court decisions, both of which were affirmed by the United States Supreme Court. *Brown* v. *Supreme Court of Virginia,* 359 F.S. 549, 555 (E.D. Va. 1973) affirmed 94 S. Ct. 534; and *Ginsburg* v. *Kovrak,* 139 A. 2d 889 (Pa. 1958) affirmed by the Supreme Court in *Kovrak* v. *Ginsburg,* 358 U.S. 52 (1958).

The facts in *Norfolk and Western,* supra, are identical to the facts in the present case. In *Norfolk* the plaintiffs were out of state attorneys who, over a period of years, regularly appeared in the Illinois state courts, even though they were not licensed to practice law in Illinois. These attorneys were summarily removed from pending state cases by the state trial courts pursuant to rules[3] which are almost identical to Rule I Section 8 (c) of the Ohio Rules. This is the rule the Ohio trial court relied on in the instant case in refusing to allow out of state attorneys Fahringer and Cambria to represent criminal defendants Flynt and Hustler Magazine, Inc., in the Ohio criminal proceedings. In *Norfolk* the Illinois judges entered orders striking the names of the non-resident attorneys as counsel of record, while at the same time permitting out-of-state counsel to be associated in the cases with local counsel in a consulting or advisory role at trial. This was exactly the relief offered out of state counsel in the present case by Ohio Judge Kraft. (see appendix p. 56) *This was done in Norfolk without granting a hearing to out of state*

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[3] **ILLINOIS SUPREME COURT RULE 707. FOREIGN ATTORNEYS IN ISOLATED CASES**

Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed.

counsel, despite the fact that they had extensively prepared the pending cases. The lower court in *Norfolk* refused to grant relief to out-of-state counsel, stating:

> "That the cases are of federal origin, that the Plaintiffs' attorneys have been permitted to appear without limitation numerous times in the past, that the cases are presently being prepared for trial, that the Plaintiffs' attorneys are specialists regularly representing Plaintiffs in Madison County and elsewhere . . . that Plaintiffs' attorneys have caused no disciplinary problems – these are not factors singly or cumulatively which require that the Illinois statute be found constitutionally deficient."

The United States Supreme Court summarily affirmed the decision of the district court in *Norfolk*. Thus the decision of the Sixth Circuit Court of Appeals in the present case is directly in conflict with the decision of the Supreme Court in *Norfolk and Western*. In *Norfolk* the Supreme Court held that out-of-state counsel may be removed without a hearing despite the fact that they had extensively prepared for trial. In the instant case the lower court reached a directly opposite result. It does not matter that the out-of-state attorneys in *Norfolk* attacked the constitutionality of the State pro hac vice rule while the attorneys in the instant case couched their appeal in another form. The results in the two cases are directly in conflict despite the identical facts.

The decision of the lower court in this case is also in conflict with this court's decision in *Brown* v. *Supreme Court of Virginia*, 359 F.S. 549, 555 (E.D. Va. 1973), affirmed 94 S. Ct. 534; and *Ginsburg* v. *Kovrak*, 139 A. 2d 889 (Pa. 1958), affirmed by the Supreme Court in *Kovrak* v. *Ginsburg*, 358 U.S. 52 (1958). Both of these cases guarantee to the states the right to prohibit the practice of law by out-of-state counsel without granting them a hearing.

Petitioner would also point out two decisions from other Circuit Courts of Appeals which are in conflict with the decision of the lower court in this case. In the present case

the Sixth Circuit Court of Appeals held that out-of-state counsel had a right to appear in Ohio courts which could not be denied without a hearing. The Fourth Circuit Court of Appeals, in the case of *Thomas* v. *Cassidy*, 249 F. 2d 91 (4th Cir. 1957), stated as follows:

> "It is well settled that permission to a non-resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a matter of right but a privilege the granting of which is a matter of grace resting in the sound discretion of the presiding judge . . . There is a grave doubt whether the denial of such permission is appealable, since what is denied is not a right but a mere privilege."

In *Hawkins* v. *Moss*, 503 F. 2d 1171 (4th Cir. 1974), the court held that the mere fact that an attorney has been licensed to practice in one state gives him no right to practice in another state. The court stated that such licenses ". . . have no extra-territorial effect or value and can vest no right in the holder to practice law in another state. Both of these decisions are in conflict with the holding of the lower court in this case that out-of-state counsel have a right to practice in Ohio.

The lower court in this action apparently felt that a right to practice in Ohio had somehow vested in out-of-state counsel because they had been admitted pro hac vice and then removed without a hearing. This of course is contrary to what occurred since out-of-state counsel were never admitted pro hac vice in the state criminal trial. In fact, they were specifically denied admittance. Admission pro hac vice in Ohio is governed by Rule I Section 8 (C) of the Ohio Rules for the Government of the Bar. That rule states in pertinent part as follows:

> ". . . This paragraph (c) does not apply to participation by a non-resident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such case."

The law is thus clear in Ohio that out-of-state counsel must apply to the trial judge hearing the case in order to be admitted pro hac vice. The parties in the Ohio Criminal Proceedings knew the moment that the indictment was returned that the trial judge would be Judge Morrissey. This was due to the nature of the case assignment system in Hamilton County, Ohio. Since defendant Flynt was already subject to an existing indictment, the new indictment automatically was assigned to the same jurist. In this case, Judge Morrissey. At no time did Judge Morrissey ever admit out-of-state counsel Fahringer and Cambria on a pro hac vice basis. The fact that these out-of-state counsel had been admitted to practice in the past in no way guaranteed them automatic pro hac vice status in future cases. *Norfolk and Western Railway Co.* v. *Beatty*, 400 F.S. 234 (S.D. Ill., 1975) affirmed 423 U.S. 1009. *Brown* v. *Supreme Court of Virginia*, 359 F.S. 549 (E.D. Va., 1973) affirmed 94 S. Ct. 534.

Furthermore, the lower courts in this case also granted relief under 42 U.S.C. Section 1983 and under the due process clause in order to protect the reputation of the out-of-state attorneys with regard to their 'competency and integrity'. To the extent that the lower courts felt this gave rise to 'property right' in reputation which is protected under the 14th Amendment and grants federal courts jurisdiction under 42 U.S.C. Section 1983, they are in conflict with the decision of this Court in the case of *Paul* v. *Davis*, 96 S. Ct. 1155 (1976). That decision held that injury to reputation alone will not give rise to a due process claim and federal jurisdiction under 42 U.S.C. Section 1983. The lower court's decision here is clearly in conflict with this holding.

As pointed out above the ruling of the Sixth Circuit Court of Appeals in this case is in direct conflict with holdings of the United States Supreme Court, and various decisions of other Courts of Appeals. For this reason a Writ should be granted in this case. *Avco Corp.* v. *Lodge* 735, 390 U.S. 557 (1968); *Northwestern National Bank* v. *United States*, 387 U.S. 213 (1967); Rules of the Supreme Court of the United

States, Rule 19, *Considerations Governing Review on Certiorari* Section 1 (b).

2. The decision of the lower court, enjoing an ongoing state criminal prosecution to protect the alleged rights of one not a party to that prosecution, raises a serious question as to federal abstention under the doctrine of Younger v. Harris, which question has not yet been dealt with by this court. Further, the lower court's decision to so enjoin an ongoing state criminal prosecution is in conflict with the decision of another Court of Appeals.

a.) Abstention Issue not previously settled by this Court.

In the instant case the lower court has enjoined an ongoing state criminal prosecution to protect the rights of one not a party to that prosecution. More specifically the lower court has enjoined an ongoing state criminal prosecution to protect the 'rights' of out of state attorneys to earn a fee and preserve their reputation for competency and integrity.[4] This decision goes against the grain of a strong federal policy of abstention from interference in state criminal matters. This particular case involves an area of the abstention doctrine which this Court has never dealt with and which this Court should consider.

The essence of the lower courts holding here is that an ongoing state criminal prosecution has been stopped for reasons which bear no relationship to the state defendant or his rights. This holding would appear to be in conflict with the decision of this Court in *Stefanelli* v. *Minard*, 342 U.S. 117

[4] As pointed out previously, to the extent that the lower courts granted injunctive relief to protect the out of state attorneys reputation for competency and integrity their decision is in direct conflict with this Court's decision in *Paul* v. *Davis*, supra, and would indicate that a Writ of Certiorari would be appropriate.

(1951) and bends the *Younger* v. *Harris*, 401 U.S. 37 (1971) doctrine of abstention to the breaking point.

Younger v. *Harris*, supra, and its' companion cases *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971) and *Byrne* v. *Karalexis*, 401 U.S. 216 (1971) set forth the proposition that federal courts will only on rare occasions intervene in state criminal trials. It is submitted that federal courts will not intervene where one not being prosecuted seeks to stop an ongoing state criminal prosecution. This is true even where intervention is sought by way of a Section 1983 action, since those actions are also controlled by the principles of federal state comity set forth in *Younger* v. *Harris*, supra, *Mitchum* v. *Foster*, 407 U.S. 225 (1972). In discussing these principles of federal state comity the *Younger* court limited the right to intervene in state proceeds to situations,

> ". . . where a person about to be prosecuted in a state case can show that he will . . ." (401 U.S. at 43)

suffer irreparable injury.

The Supreme Court in *Younger* v. *Harris*, supra, emphasized that intervention in a state court is a serious matter. In considering whether those parties who were not being prosecuted in the state could maintain a federal suit seeking intervention the Court stated that:

> "A federal lawsuit to stop a prosecution in a state court is a serious matter, and persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases."

The implication in this language is that only those who are defendants in state criminal actions may seek federal intervention. This is in accord with the notions of federal-state comity and "Our Federalism" which are discussed in *Younger* v. *Harris*, supra. See also *Boyle* v. *Landry*, 401 U.S. at 81.

Those not being prosecuted may not intervene in ongoing state criminal prosecutions.

In all of the cases mentioned above in which the Supreme Court has dealt with federal intervention in state criminal proceedings the party seeking intervention has been the defendant in the state court action. In none of these cases has a party other than a state criminal defendant tried to enjoin the state criminal trial. The closest the Supreme Court has come to dealing head on with this situation is where persons in a position similar to the state defendants tried to intervene, *Hicks* v. *Miranda*, 422 U.S. 332 (1975). However, the parties seeking to intervene in *Hicks* were made state defendants the day following the filing of the federal claim. Thus the Supreme Court has never dealt with a situation where a party other than the state criminal defendant has tried to enjoin an ongoing state criminal proceeding.

However, the Supreme Court has dealt with the issue of federal intervention in a state criminal prosecution over matters collateral to that prosecution. In *Steffanelli* v. *Minard*, 342 U.S. 117 (1951) the Court stated that:

> "If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues . . ."

The implication of the language is clear. Where the issue raised is not even collateral, but involves the alleged rights of those not even parties to the state criminal prosecution, the federal court should not intervene at all.

If state criminal prosecutions could be enjoined by those not defendants in said prosecutions, such as would be attorneys, a veritable pandoras box of possible intervention causes arises. For example, could the state defendant's family claim irreparable injury in the loss of the defendant's financial support, if imprisoned, and have the right to enjoin the state prosecution? Or could prison inmates, claiming irreparable

injury through overcrowding, be permitted to seek to enjoin state criminal prosecutions to litigate their claims, which have no relation to the state trial? The effect of the lower court's ruling in this case is to allow just such types of intervention. The only case cited in the opinion of the lower court dealing with federal intervention in a State court criminal proceeding by the state defendant's excluded attorney is *Cooper* v. *Hutchinson*, 184 F. 2d 119 (C.A. 3, 1950), a case which predates *Younger*. That case is not in point for two reasons. First, the attorneys excluded in *Cooper* had handled the case through the entire appellate process and won a reversal, this is much more extensive participation than in the instant case. Secondly, and more important, the ruling in *Cooper* was designed to protect the state defendants. In this case the ruling was designed solely to protect the financial interest of the out-of-state attorneys. It was *not* designed to protect the state court defendants. *Cooper* v. *Hutchinson*, supra, is not authority to support the action taken by the lower court here. It is submitted that the doctrine of *Younger* v. *Harris*, supra, and its companion cases, must be interpreted to prevent a federal court from enjoining an ongoing state criminal proceeding for reasons not related to that state prosecution.

However, even if those not parties to a state criminal proceeding may enjoin such a proceeding, they must still meet the requirements of *Younger* v. *Harris*, supra, see e.g. *Hicks* v. *Miranda*, 422 U.S. 332 at 349 (1975):

> "The rule in *Younger* v. *Harris*, is designed to permit state courts to try state cases free from interference by federal courts . . . Plainly the same comity considerations apply . . . where the interference is sought by some, such as appellees, not party to the state case."

In *Kugler* v. *Helfont*, 421 U.S. 117 (1975) the Supreme Court reviewed its holding in *Younger* and listed the circumstances under which a federal court might intervene in a pending state criminal prosecution:

> "Accordingly, the court held that in the absence of exceptional circumstances *creating a threat of irreparable injury* 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment in a pending state criminal prosecution." (421 U.S. at 123) (Emphasis added)

The *Younger* court also left room for federal intervention where there is a showing of "bad faith" or "harrassment" by state prosecuting officials, where the statute involved is patently and flagrantly unconstitutional, or where there exists other "extraordinary circumstances" in which the necessary irreparable injury can be shown. It is fundamental that the party seeking injunctive relief must plead, and the court must find, irreparable injury before a federal court will enjoin an ongoing state criminal prosecution. *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Douglas* v. *City Jeannette*, 319 U.S. 157 (1943); *Kugler* v. *Helfont*, supra. In the present case the lower court made no such finding.

Out-of-state attorneys Fahringer and Cambria alleged irreparable injury in the loss of their attorney-client relationship with Flynt and Hustler Magazine, Inc. Presumably the real basis of their alleged loss is the loss of their fee for legal services. Indeed, the Court of Appeals uses the out-of-state attorneys financial loss to justify federal intervention in this case, although it does *not* find this financial loss to be an irreparable injury.

Preliminarily it should be noted that the ruling of Ohio trial Judge Robert Kraft did not destroy the attorney-client relationship, since he did allow out-of-state counsel to render advice and help prepare the case for trial, while not allowing them to serve as trial counsel. Secondly, the courts have uniformly and consistently held that a defendant's financial loss in defending against a state prosecution is not such irreparable harm as will justify federal intervention. *Younger* v. *Harris*, supra, *Kugler* v. *Helfont*, supra, *Krahm* v. *Graham*, 461 F. 2d 703 (1972). Thus it would seem that financial loss

is not such an irreparable injury as would allow intervention. If the defendants financial loss is insufficient to justify federal intervention, his would-be attorneys' loss of a fee is a no more valid reason.

The enjoining of an ongoing state criminal prosecution by the federal courts here to protect the financial interests of persons who are not defendants in that state court prosecution raises an issue as to abstention which the Supreme Court has never dealt with. It is submitted that this issue is a serious one which this Court should review.

b.) Conflict with Other Courts of Appeal

The decision of the Sixth Circuit Court of Appeals in this case to enjoin an ongoing state criminal prosecution in order to protect the financial interests of out-of-state counsel is in direct conflict with a decision by the Second Circuit Court of Appeals. The case in reference is *Bedrosian* v. *Mintz*, 518 F. 2d 396 (C.A. 2, 1975). That case involved out-of-state counsel who wished to represent defendants in state criminal prosecutions arising out of the Attica prison riots. These out-of-state counsel were not licensed to practice in New York. The New York trial courts did admit out-of-state counsel pro hac vice, but refused to pay them with state funds to represent indigent defendants.

These out-of-state attorneys sought relief in the federal courts, requesting that ongoing state criminal prosecutions be enjoined until the out-of-state attorneys were assured of financial renumeration. The Second Circuit, in *Bedrosian*, refused to provide the relief requested and allowed the state criminal prosecutions to proceed. The basis of the decision in *Bedrosian* was that federal courts should not interfere in ongoing state proceedings over a collateral matter. The Second Circuit relied on the case of *Stefanelli* v. *Minard*, 342 U.S. 117 (1951) as a basis for its decision.

The conflict here is obvious. The Second Circuit refused to enjoin an ongoing state criminal prosecution to protect

the financial interest of out-of-state counsel, while the Sixth Circuit in this case has enjoined an ongoing state criminal proceeding to protect the financial interest of out-of-state counsel. For this reason a Writ of Certiorari is applicable to resolve this conflict.

CONCLUSION

The decision of the lower court forcing Ohio trial courts to allow foreign counsel, not admitted to the Ohio bar, to practice in the Ohio courts is in conflict with decisions of this Court. The lower courts action in enjoining an ongoing state criminal prosecution to protect the financial interests of one not a party to that prosecution raises a serious question concerning the doctrine of abstention which has never been dealt with by this court and which is in conflict with a decision of another Court of Appeals.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit in this matter.

Respectfully submitted,

FRED J. CARTOLANO
First Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202
Counsel for Petitioner

WILLIAM E. BREYER
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Of Counsel

APPENDIX

No. 77-3426

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY FLYNT, HUSTLER MAGAZINE, INC., HERALD PRICE FAHRINGER, and PAUL J. CAMBRIA, JR.,
Plaintiffs-Appellees,

v.

SIMON L. LEIS, JR., HONORABLE WILLIAM J. MORRISSEY, HONORABLE ROBERT S. KRAFT, and THE HAMILTON COUNTY COURT OF COMMON PLEAS,
Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 12, 1978.

Before: LIVELY, ENGEL and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. The Court of Common Pleas of Hamilton County, Ohio, has refused to allow two out-of-state lawyers, Harold Price Fahringer and Paul J. Cambria, Jr., to appear *pro hac vice* (meaning "for this turn" or case) on behalf of publisher Larry Flynt and Hustler Magazine, Inc., defendants in a pending state criminal obscenity case. After an unsuccessful attempt to obtain a writ of mandamus from the Supreme Court of Ohio, the two lawyers and their clients filed a complaint in the United States District Court for the

Southern District of Ohio. They alleged a violation of the Sixth and Fourteenth Amendments and claimed federal jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

The District Court concluded that the attorneys' procedural due process rights under the Fourteenth Amendment were violated because the state court failed to hold a hearing before barring the attorneys' appearance *pro hac vice*. The District Court issued an injunction against the judges of the Court of Common Pleas and the local prosecutor, enjoining the prosecution of Flynt and Hustler temporarily until the two attorneys are granted a due process hearing. The judges and the prosecutor appeal. They argue that under the principle of *Younger* v. *Harris*, 401 U.S. 37 (1971), the federal court is precluded from enjoining the state prosecution, and that the two out-of-state lawyers were, in any event, properly refused *pro hac vice* admission.

We hold that the lawyers' rights of procedural due process were abridged and that the federal injunctive remedy does not transgress the principles of *Younger* v. *Harris* because the lawyers do not have an adequate state remedy in the pending state court proceedings.

I. STATEMENT OF THE CASE

A. The State Court Proceedings

Flynt and Hustler Magazine were indicted on February 8, 1977, under Ohio Revised Code § 2907.31 for disseminating material harmful to juveniles. The material in question was a publication entitled "War, The Real Obscenity," containing photographs which, according to the indictment, displayed "in lurid detail the violent physical torture, dismemberment, destruction or death of a human being." On February 25, 1977, the defendants were arraigned before Judge Rupert Doan. Prior to the arraignment, counsel-of-record forms were filed with the clerk of the Court of Common Pleas designating Fahringer as counsel for the defendant Flynt, Cambria as counsel for Hustler Magazine, and Andrew B. Dennison, a

member of the Ohio Bar, as counsel for both defendants. These forms were approved and ordered entered of record by Judge Doan on February 23, 1977. The Judge made the entry under local Rule 10(F), which provides that the court itself must approve and enter counsel's appearance in the case and that trial counsel may not thereafter withdraw without court permission.[1]

On March 9, 1977, Judge William J. Morrissey, to whom the case was assigned for trial, advised Dennison that Fahringer and Cambria would be stricken as counsel of record in the case. They appeared before Judge Morrissey on April 8, 1977. Without granting the lawyers a hearing, he said simply that "Mr. Fahringer and Mr. Cambria are not attorneys of record in this case and will not be permitted to try this case" and told Flynt, "you will be restricted to having an attorney that's admitted to practice in the State of Ohio." No other explanation was given.

A mandamus action was then filed in the Ohio Supreme Court, as well as an affidavit of bias and prejudice against Judge Morrissey. In a brief order the Court dismissed the mandamus action without explaining its reasons but granted the request to remove Judge Morrissey from the case. The case was reassigned for trial to Judge Robert Kraft who heard argument on whether the lawyers should be readmitted. Judge Kraft concluded that he was "bound" by the Ohio Supreme Court's decision dismissing the mandamus action and that he did not have the power to reopen the question.

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[1] Rule 10(F) provides: "Any attorney who accepts private employment in any criminal case shall be required to sign the following entry which shall be filed with the papers in the case: [Style of case] . . . . The undersigned has been retained as counsel for the above named defendant and moves the Court that such fact be entered of record. [Signature of Attorney] . . . . It is so ordered. [Signature of Judge] . . . . Thereupon such attorney shall become Attorney of Record upon the Journal of this Court and shall not be permitted to withdraw except upon written motion and for good cause shown."

B. Admissions Pro Hac Vice Under Ohio Law

The Court of Common Pleas has no rule which specifically permits *pro hac vice* admission of out-of-state attorneys, but Rule I, § 8(C) of the Supreme Court of Ohio Rules for the Government of the Bar of Ohio allows "participation by a non-resident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."[2] The desirability of *pro hac vice* admissions is also recognized by Canon 3 of Ohio's Code of Professional Responsibility which provides in part:

> [T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.[3]

The case law in Ohio establishes that the decision to grant special permission to appear is a matter "lying within the sound discretion of the trial court."[4]

It is customary in Cincinnati for the Court of Common Pleas to allow out-of-state counsel to appear *pro hac vice*. The same two out-of-state lawyers had previously appeared as trial counsel in other cases in Judge Morrissey's court without incident, and both appear to have exemplary academic and professional qualifications, including extensive experience handling First Amendment cases in state and federal courts.

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[2] 29 Ohio St. 2d xxiv (1972).

[3] 23 Ohio St. 2d 23 (1970). This language is the same as Canon 3, Ethical Consideration 3-9 of the American Bar Association's *Code of Professional Responsibility*, which has been adopted in Ohio and many other states.

[4] *State* v. *Ross*, 304 N.E.2d 396, 399, 36 Ohio App.2d 185, 188 (1973), *cert. denied*, 415 U.S. 904 (1974).

C. The Federal Court Proceedings

The two out-of-state lawyers and their clients filed a complaint in the United States District Court for the Southern District of Ohio asking for a finding that their Sixth and Fourteenth Amendment rights had been violated and for an injunction temporarily delaying the state criminal trial until after the state court held a hearing to consider *pro hac vice* admission of the two attorneys.

The District Court found that the state court routinely admitted out-of-state lawyers *pro hac vice* in other cases without any procedural requirements apart from the filing and court approval of counsel-of-record forms, that such forms had been filed by Cambria and Fahringer and approved by court order, and that the state court had then removed the two lawyers from the case without an opportunity for a hearing and without a statement of reasons.

The District Court held that counsel may not be refused appearance *pro hac vice* except upon a showing of prior unethical conduct or refusal to abide by the canons of ethics or the rules of the court. It did not reach the issue of whether the constitutional rights of Flynt and Hustler Magazine had also been violated. The court noted the general rule that federal courts must not enjoin pending state criminal prosecutions except under extraordinary circumstances, *Younger* v. *Harris*, 401 U.S. 37 (1971), but it went on to hold that federal interference in the present case was justified since the two attorneys could not vindicate their federal rights in the ongoing state proceedings. On these grounds, the District Court issued an injunction against the Court of Common Pleas, temporarily enjoining the prosecution of the state action pending a hearing on the question of the admission of the lawyers *pro hac vice*. No hearing has yet been held.

II. THE PROCEDURAL DUE PROCESS ISSUE

A client may terminate a lawyer's services without cause or reason, but due process and elementary fairness require that we observe certain principles for the protection of lawyer and client when a judicial officer discharges the lawyer. In order to insure regularity and impartiality in the administration of justice and secure the similar treatment of similar cases, judges may not upset reasonable expectations in the important affairs of life such as employment of counsel without a hearing, the application of a reasonably clear standard, and a statement of reasons. Otherwise, it would be too easy to justify, and too difficult to remedy, random arbitrariness and sporadic injustice.[5]

Precedent requires us to apply these principles of due process to the licensing and removal of officers of the court, including admissions *pro hac vice*. Federal courts have frequently invalidated arbitrary restrictions on bar admissions and the practice of law. Over one hundred years ago, the Supreme Court, in *Ex parte Garland*,[6] invalidated a federal statute excluding Confederate sympathizers from practice in federal courts. In *Konigsberg* v. *State Bar*[7] and *Schware* v. *Board of Bar Examiners*,[8] the Supreme Court held that California and New Mexico violated the Fourteenth Amendment by applying in an arbitrary way a vague standard in order to deny bar

[5] For a discussion of the reasons underlying basic procedural due process rights, see Dworkin, *Taking Rights Seriously* 14-45 (1977); Rawls, *A Theory of Justice* 235-38 (1971).

[6] 71 U.S. (4 Wall.) 333 (1867).

[7] 353 U.S. 252 (1957).

[8] 353 U.S. 232, 239 n. 5 (1957): "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."

admission to applicants who had formerly belonged to the Communist party.[9] In a recent series of cases the Supreme Court has invalidated attempts by state bar associations to prohibit group legal services plans.[10]

Due process and equal protection principles also apply to admission to practice *pro hac vice*. Judge Herbert Goodrich, writing for the Third Circuit in *Cooper* v. *Hutchinson*,[11] held that a state judge violated due process and the federal civil rights law in a New Jersey murder trial when, without a meaningful hearing or statement of reasons, he withdrew permission for out-of-state counsel to appear. Likewise, in *Ross* v. *Reda*,[12] this Circuit, while upholding a state judge's exclusion of out-of-state counsel for cause, suggested that "the prerogative of a trial judge to exclude out-of-state counsel, like the right of a defendant to be represented by the counsel of his choice, is not an absolute right,"[13] and may not be exercised arbitrarily. Defendants conceded at oral argument that an out-of-state lawyer could not be refused *pro hac vice* admission on grounds of race or for other constitutionally forbidden reasons. Of course, it is impossible to know whether a court based its decision on such factors if the court does not grant a hearing or give reasons for its refusal.

The longstanding practices and customs of the legal pro-

[9] The Supreme Court has long held that the Fourteenth Amendment prohibits state imposition of an arbitrary standard or the arbitrary application of an inoffensive standard in order to deny employment opportunities to individuals. *See, e.g., Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956).

[10] *See NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *UMW Dist. 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union* v. *State Bar*, 401 U.S. 576 (1971). The states argued in these cases that such group legal activities constitute the unauthorized practice of law.

[11] 184 F.2d 119 (3d Cir. 1950).

[12] 510 F.2d 1172 (6th Cir. 1975), *cert. denied* 423 U.S. 892.

[13] *Id.* at 1173.

fession lead us to the same conclusion. Representation *pro hac vice* is not a new privilege. A long legal tradition supports such appearance by the American lawyer licensed in a sister state and the English barrister admitted under the auspices of a different court or Inn. The custom was well-recognized by English judges in the seventeenth century and by American judges by the middle of the nineteenth century, Judge Goodrich reports in *Cooper* v. *Hutchinson.*[14] In many instances private and public interests are well-served by lawyers who travel to other states and countries to plead a client's cause. Practically all of our states by statute or court rule, and the federal courts by custom or rule, now make provision for special court appearances by lawyers licensed in other jurisdictions;[15] and several countries allow foreign lawyers to appear *pro hac vice,* including the federal and local courts in Germany, Switzerland and Canada.[16]

Nonresident lawyers have appeared in many of our most celebrated cases. For example, Andrew Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York in 1735 in colonial America's most famous freedom-of-speech case.[17] Clarence Darrow appeared in many states to plead the cause of an unpopular client, including the famous *Scopes* trial in Tennessee where he opposed another well-known, out-of-state lawyer, William Jennings Bryan. Great lawyers from Alexander Hamilton and Daniel Webster to Charles Evans Hughes and John W. Davis were specially admitted for the trial of important cases in other states. A small group of lawyers appearing *pro hac vice* inspired and initiated the civil rights movement in its early stages. In a series of cases brought in courts throughout the South, out-of-state lawyers Thurgood Marshall, Constance Motley and Spotswood Robinson, before their appointments to the federal bench, developed the legal principles which gave rise to the civil rights movement.[18]

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[14] 184 F.2d 119, 122 (3d Cir. 1950).

[15] *See* Katz, *Admission of Nonresident Attorneys Pro Hac Vice,* Research Contributions of the American Bar Foundation, No. 5 (1968); Brakel and Loh, *Regulating the Multi-State Practice of Law,* 50 Wash. L. Rev. 699 (1975); Note, *Easing Multi-State Practice Restrictions — "Good Cause" Based Limited Admission,* 29 Rutgers L. Rev. 1182 (1976); Note, *Appearances By Out-of-State-Counsel,* 9 Conn. L. Rev. 136 (1976).

[16] *See* Comment *International Legal Practice Restrictions on the Migrant Attorney,* 15 Harv. Int'l L. J. 298 (1974).

[17] *See* Alexander, *The Trial of John Peter Zenger* 17-26, 61 (1963).

There are a number of reasons for this tradition. "The demands of business and the mobility of our society" are the reasons given by the American Bar Association in Canon 3 of the Code of Professional Responsibility. That Canon discourages "territorial limitations" on the practice of law, including trial practice.[19] There are other reasons in addition to business reasons. A client may want a particular lawyer for a particular kind of case, and a lawyer may want to take the case because of the skill required. Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense.[20] These are important values, both for lawyers and clients, and should not be denied arbitrarily.

Ohio has no specific standards regarding *pro hac vice* admissions, and we cannot define with certainty the status of the lawyers at the moment they were dismissed. The state court had approved their counsel of record forms at arraignment and had allowed the lawyers to participate in the initial steps of the state court proceeding. They had an agreement with their clients, and once the court authorized them to act, their obligations to their clients and their reasonable ex-

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[18] *See* Kluger, *Simple Justice* (1975).

[19] *See* text accompanying note 3, *supra.*

[20] *See* Fried, *An Anatomy of Values* 132-36 (1972).

pectations of professional service were strengthened, whatever may have been the nature of their interests when they originally sought admission. Their interests had developed to a point where the court's action in removing them not only deprived them of their expectation of service and remuneration but also adversely reflected upon their competence and integrity. Due process standards may perhaps differ depending on the stage of the proceedings, but here the lawyers' interest had clearly advanced to a stage where, as a matter of due process, they could not be denied the right to appear without a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion.

III. THE YOUNGER v. HARRIS ABSTENTION DOCTRINE

The second argument of the state judges and prosecutor is based on a judge-made principle of judicial restraint enunciated in 1971 in *Younger* v. *Harris*.[21] There a federal district court held California's criminal syndicalism statute unconstitutional and enjoined a pending state court prosecution under the statute. Issuing a broad call for judicial restraint in federal cases which may disrupt and offend state courts ("the normal thing to do when federal courts are asked to enjoin pending proceedings in state court is not to issue such injunctions"),[22] the Supreme Court decided under principles of equity and comity that lower federal courts should not enjoin a pending state criminal prosecution when the constitutional claimant has an adequate opportunity to raise his claim in the course of the state proceedings and an adequate state remedy appears to be available.

The first reason given in *Younger* for the "longstanding public policy against federal court interference with state court proceedings" is "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[23] The second reason is comity, "a proper respect for state functions . . . and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[24]

[21] 401 U.S. 37 (1971).

[22] *Id.* at 45.

The *Younger* abstention doctrine rests on the presumption that an adequate state remedy for the federal claim exists, and it is based on strong, practical considerations.[25] The doctrine applies only to cases in which a state court proceeding is already pending and expresses a preference in such cases for a resolution of the constitutional issues in the state court, thereby conserving legal manpower and litigant time and expense, minimizing delay, and encouraging compliance with state criminal laws. It recognizes and encourages fairness and increasing sensitivity by state courts in matters of constitutional law[26] and avoids unseemly conflict between court systems and judicial officers.[27]

The Supreme Court in *Monroe* v. *Pape*,[28] decided ten years before *Younger*, opened up the federal courts to a flood of

[23] *Id.* at 43-44.

[24] *Id.* at 44.

[25] *See Developments in the Law, Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1282-87 (1977).

[26] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[27] For a brief description of how destructive competition among the prerogative, chancery and law courts undermined the legal system in 17th century England, *see* Plucknett, *A Concise History of the Common Law* 191-98 (5th ed. 1956).

[28] 365 U.S. 167 (1961).

civil rights cases when it concluded that plaintiffs may bring a claim in federal court under § 1983 without exhausting their state judicial remedies. The effect was to create two competing forums or court systems for constitutional litigants to choose between. From 1960 to 1976, the number of civil rights cases filed in the federal courts increased from 280 to 12,392.[29] If, in addition, every arguably erroneous ruling by a state trial judge which might affect a defendant's constitutional rights were subject to immediate review and correction by a federal court, the present system of federal courts could probably not survive.

On the other hand, federal courts must also be sensitive to competing considerations, particularly the responsibility of federal courts to uphold national law and guard against the abridgement of federally-created rights, and they must not use the abstention doctrine as a pretext for allowing constitutional wrongs to go unremedied. We do not apply the abstention doctrine correctly if we view it as a return to the concepts of state sovereignty that existed during the era of *Chisolm* v. *Georgia*,[30] the Anti-Injunction Act of 1793[31] and the adoption of the Eleventh Amendment.[32] Our concepts of federal judicial responsibility in relation to the states have changed over time with the adoption of the Civil War Amendments, the Civil Rights Acts, the assignment of civil rights and general federal question jurisdiction to the federal courts

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[29] *See the 1976 Annual Report of the Director of the Administrative Office of the United States Courts*, Table 16.

[30] 2 U.S. (2 Dall.) 419 (1793). *See* Goebel, *History of the Supreme Court of the United States, Antecedents and Beginnings to 1801*, 722-60 (1971).

[31] Section 5, 1 Stat. 334-335 (1793): "[A] writ of injunction [shall not] be granted to stay proceedings in any court of a state." The current version of this statute, as amended, is codified in 28 U.S.C. § 2283 (1970) and now contains an exception allowing such injunctions in § 1983 actions, *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

[32] *See generally* Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972).

and the gradual change in our thinking about equal protection and due process following the two World Wars.

In weighing the various competing interests, *Younger* appears to strike this balance: Federal courts must abstain in favor of pending state court proceedings when good reasons exist for assuming that in the absence of federal intervention an adequate state remedy is available to correct the claimed constitutional violation.[33]

In the instant case the out-of-state lawyers do not have an adequate state remedy for the due process violation, and we therefore affirm the decision of the court below enjoining temporarily the state court proceedings pending a due process hearing. Without a meaningful hearing, the application of a clear legal standard, or a statement of reasons, the state trial judge removed out-of-state lawyers who, along with their clients, unsuccessfully carried the issue to the state supreme court where the appeal was dismissed, again without a statement of reasons. A second trial judge assigned to the case then refused to reconsider the issue on the grounds that the state supreme court order dismissing the appeal constituted a final decision precluding the lawyers from participation. These facts not only convince us that we may not justifiably assume that an adequate state remedy in the pending proceedings exists; it also appears that the lawyers have in fact exhausted their state trial and appellate remedies prior to filing this case.[34]

We do not ignore the possibility that the other plaintiffs,

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[33] Where the burden of persuasion of showing the "adequacy" or "inadequacy" of state remedies should be placed is a question as yet unanswered. In view of the difficulty of assessing in advance the "adequacy" of state remedies in hard cases, the current *Younger* standard may move toward the requirement of exhaustion of state remedies in the pending state case, including the exhaustion of appellate remedies.

[34] Since the lawyers have exhausted their state remedies, the *Pullman* abstention doctrine is inapplicable. Under that doctrine, the federal action is stayed while the parties attempt to resolve in state court unsettled issues of state law which may make the resolution of the

Flynt and Hustler Magazine, could raise a Sixth Amendment claim at trial and, if convicted in the Court of Common Pleas, upon direct appeal in state court. While this issue is not addressed by the parties, we have no reason to doubt that the Sixth Amendment claim can be raised as a defense or that the remedy provided by the state court system on appeal would be adequate to vindicate Sixth Amendment rights. As parties to the pending prosecution, however, Flynt and Hustler Magazine are in a different position than their attorneys, who are unable to raise their constitutional claims as a defense to the prosecution at trial or on appeal. The fact that Flynt and Hustler Magazine may have an adequate state court remedy cannot protect the separate employment interests of the lawyers. Neither party has suggested that the current state proceedings would provide an avenue for vindication of the lawyers' rights.

We also note that the considerations of comity in the present case are much less significant than in *Younger* and in other cases where the doctrine has been invoked. While the relief sought by the plaintiffs necessarily entails a delay in the state court criminal prosecution, the grant of relief will not permanently prevent the prosecution. Following the hearing, the state prosecution may go forward on the merits. The grant of relief by the federal court will not prevent the state from interpreting and enforcing its own criminal laws.

Thus the equity and comity considerations here are not the same as in *Younger*, while the need for a remedy in federal court is strong. We find support for the distinctions we

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federal constitutional claim in federal court unnecessary. *See Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); Field, *The Abstention Doctrine Today*, 125 U. Pa. L. Rev. 590 (1977); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. Pa. L. Rev. 1071 (1974). For a case applying the *Pullman* doctrine in order to allow state courts to decide unsettled questions concerning *pro hac vice* admissions, *see Silverman* v. *Browning*, 359 F. Supp. 173 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 941 (1973), *further considered after state court review*, 414 F. Supp. 80 (D. Conn. 1976), *aff'd mem.*, 429 U.S. 876 (1976).

have drawn above in the recent case of *Gerstein* v. *Pugh*.[35] There Florida state authorities initiated a state criminal prosecution by filing a prosecutor's information rather than by grand jury indictment. Under this procedure neither a prior finding of probable cause nor a subsequent preliminary hearing was necessary. In a federal action filed by claimants who were defendants in the pending state prosecution, the Supreme Court required that the state grant defendants a preliminary hearing to determine whether there was a probable cause to support detention under the information. The court held the abstention doctrine no bar to the federal action because the "legality of pretrial detention without a judicial hearing" is a collateral "issue that could not be raised in defense of the criminal prosecution" and, therefore, "could not prejudice the conduct of the trial on the merits."[36] Similarly, in the present case, the exclusion of the lawyers is a collateral issue unrelated to the merits of the state criminal case. As the court said in *Gerstein*, "the injunction was not directed at the state prosecution as such;" it only required the state court to hold a hearing on a collateral issue.[37]

Finally, it seems that we would be in the position of deciding the merits of the lawyers' due process claim if we abstained. We would have to find that a remedy which is insufficient for purposes of due process – no hearing and no statement of reasons – is a sufficient remedy for purposes of abstention. We think the two standards are approximately the same for purposes of this case. On the merits of the procedural due process issue, the state remedies are constitutionally inadequate, and they are also inadequate to support abstention. The decision of the District Court is, therefore, affirmed.

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[35] 420 U.S. 103 (1975).

[36] *Id.* at 108 n. 9.

[37] *Id.* We recognize, of course, that *Gerstein* is not directly on point. There the injunction did not delay the prosecution but merely reached the issue of confinement pending trial; here the effect has been to halt the state criminal proceedings, although only temporarily.